No. 12,531

IN THE

United States Court of Appeals

For the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (a corporation),
Appellant,

vs.

BERTHA LEE PORTER, as Special Administratrix of the Estate of Charles E. Porter, Deceased,
Appellee.

APPELLANT'S OPENING BRIEF.

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STATEMENT OF PLEADINGS.

STATEMENT OF JURISDICTIONAL FACTS.

This is an appeal by the defendant below, State Farm Mutual Automobile Insurance Company, from a final judgment against it based upon a verdict for $11,023.31. (Tr., p. 54.)

The action was between—Porter, a California citizen and resident, and State Farm Mutual Automobile Insurance Company, a citizen of the State of Illinois. The suit was on an insurance policy, and jurisdiction of the trial Court was based on diversity of citizen-

ship and an amount in controversy exceeding $3000. (28 U. S. Code, Section 1332.) (Tr., pp. 2 to 10.) The jurisdiction of this Court is based on an appeal from a final judgment entered in a United States District Court (San Francisco) under Title 28, U. S. Code, Section 1291. (Tr., pp. 64, 67 to 70.)

The complaint (Tr., pp. 2 to 10) was in two counts. Both counts were based upon a final judgment obtained by plaintiff (appellee) in a California Superior Court against a man named Claggett. The first count alleged that Claggett was an additional assured under the omnibus provisions of appellant's insurance policy, by virtue of a permitted use of the insured vehicle claimed to have been given by the *named* insured and his wife.

The second count alleged that the insurance company was estopped to deny, and had waived the right to claim, noncoverage of Claggett by virtue of certain conduct of its agents and attorneys following the accident caused by Claggett's use of the automobile. (Tr., pp. 5 to 10.)

The answer denied that coverage on Claggett had existed, on the ground that no permission had been given by the *named insured* to Claggett. (Tr., pp. 11 to 14.)

The answer also set up as separate defenses:

1. Breach of a declaration that the car insured would be principally garaged and used in Lincoln, Nebraska. (Tr., p. 12.)

2. That the policy itself restricted the method by which, and the persons by whom, a waiver or estoppel could be accomplished and such conditions had not been fulfilled. (Tr., p. 15.)

3. Lack of sufficient knowledge in the defendant of all the facts to permit the working of an estoppel or waiver against it at the time of the alleged conduct claimed to have constituted a waiver or estoppel. (Tr., pp. 19 and 20.)

4. The securing of a reservation of rights agreement from Claggett before commencing the trial in the State Court and the advising of plaintiff's counsel before said trial of the policy defenses discovered by the insurer. (Tr., pp. 25 to 27.)

At the close of the plantiff's case the defendant moved for a dismissal (Tr., pp. 106-107), and thereafter for a directed verdict (Tr., pp. 254 to 256), and for a judgment notwithstanding the verdict. (Tr., pp. 55 to 61.) These motions were denied. (Tr., pp. 257 and 67.) Notice of appeal was filed within the time required. (Tr., p. 70.)

STATEMENT OF QUESTIONS INVOLVED.

1. The evidence was insufficient as a matter of law to establish that the judgment debtor Claggett was operating the insured vehicle with the permission of the *named* insured so as to become an "insured" under the omnibus provisions of the appellant's insurance contract.

(The trial Court should have granted defendant's motion for a directed verdict and for judgment notwithstanding the verdict.)

2. The claim of waiver and estoppel to deny coverage on Claggett (the judgment debtor under the State Court judgment), was not established by plaintiff as a matter of law.

(The evidence was insufficient as a matter of law to establish the necessary prerequisites of a waiver or an estoppel and defendant's motions for a directed verdict and for judgment notwithstanding the verdict were well taken.)

3. The provisions of the insurance contract as to the methods by which and persons by whom a waiver or estoppel could be worked were not, as a matter of law, complied with.

(Such provisions in an insurance contract are valid and binding on injured parties seeking to recover on the insurance policy.)

4. Neither waiver nor estoppel can effect an enlargement of coverage, nor can they supply a failure of proof that Claggett had permission from the named insured to use the vehicle.

(The proof of permissive use, that is a prerequisite to making an unnamed person an insured, does not involve a breach of conditions or a forfeiture for noncompliance. Only the latter can be waived or disregarded because of estoppel.)

5. A declaration in the policy that the principal place of garaging and principal place of use of the insured vehicle would be in Lincoln, Nebraska, was violated when the car was brought to California with the intention of remaining here. Such breach constituted a policy violation and deprived the user of such vehicle of insurance protection under the policy.

SPECIFICATIONS OF ERROR.

The District Court erred in denying appellant's motions for a directed verdict and for judgment notwithstanding the verdict for the following reasons:

I. Plaintiff's right of recovery against appellant was predicated upon a State Court judgment against Claggett and it was not shown that appellant's insurance policy (upon which plaintiff's case was based) extended any coverage to said Claggett.

a. Because the insurance policy named only Wilbur Mehlin as insured and by definition included as "insured" "(a) the spouse of the named insured residing in the same household as the named insured,

(b) any other person but only while using the described automobile and any person or organization legally responsible for the use thereof provided the actual use of the described automobile is with the permission of the named insured." (Tr., pp. 76 and 77.)

b. And the evidence was conclusive that Wilbur Mehlin had not given permission to Claggett to use the vehicle.

c. And Mrs. Mehlin was not a judgment debtor under the State Court action and was not residing in the same household as the named insured at the time of the accident.

II. The evidence adduced did not establish the necessary elements of waiver or estoppel under the law or under the policy.

a. The conduct of the insurance company representatives, claimed as establishing waiver or estoppel, occurred before said representatives had any knowledge that the use of the vehicle by Claggett was against the wishes of the named insured and without permission.

b. No change of position, nor reliance nor detriment was shown, nor could be shown.

c. A nonwaiver agreement was taken from Claggett before trial in the State Court (Tr., pp. 229 to 235) and plaintiff was advised of it and of the policy defense prior to trial in the State Court (Tr., pp. 223, 227 to 238); but said plaintiff elected to proceed with the trial against Claggett alone, resisted a requested continuance of said trial, and obtained a judgment for $30,000 against Claggett. (Tr., pp. 221 to 226, 227 to 228 and 5.)

d. The insurance contract required a defense or settlement of claims against the insured even if the suit was groundless and also provided that:

"Acts of the Company or its representatives in performing the duties or exercising the rights under this agreement shall not operate to waive the Company's rights nor estop it from asserting any defense under the policy." (Tr., p. 33.)

The insurance contract also provided:

"8. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy signed by an executive officer of the Company." (Tr., p. 43.)

No endorsement had been issued changing or waiving coverage limitations of the policy, nor changing or waiving the provisions of section 8 above quoted. (Tr., pp. 30 to 53.)

III. The failure of proof of permissive use by Claggett could not, as a matter of law, be supplied by means of waiver or estoppel. Coverage could not be extended to Claggett by waiver or estoppel.

IV. A declaration in the policy, amounting to a warranty, was violated by the bringing of the described automobile to California with the intent to remain here. Said declaration was to the effect that the automobile would be principally garaged and used in Lincoln, Nebraska.

STATEMENT OF FACTS.

In August, 1947, appellant State Farm Automobile Insurance Company issued an insurance policy on a 1936 Ford owned by Wilbur Mehlin. The insurance contract was made in Lincoln, Nebraska. The only named insured on the policy was Wilbur Mehlin. (Tr., pp. 30 to 53.)

The insurance contract agreed to pay on behalf of the insured all sums the insured might become obligated to pay by reason of liability imposed on him by law. (Tr., p. 30.)

The company agreed to defend any suit against insured for damages, even though groundless, reserving the right to negotiate settlement. (Tr., p. 32.)

The insured was defined to include a person using the described automobile with the permission of the named insured. (Tr., p. 33.)

The policy provided that the agreement was made in reliance upon the statements in the declarations and that the agreement was subject to the exclusions and conditions and other terms of the policy. (Tr., p. 30.)

Declaration number 1 was that the automobile would be principally garaged and used in Lincoln, Nebraska. (Tr., pp. 50 and 51.)

Under "Supplementary Agreements" it was provided that acts of the Company or its representatives in performing the duties of defending and investigating or in exercising the right of settlement negotiation should not operate to waive the company's rights

or estop it from asserting any defense under the policy. (Tr., pp. 32 and 33.)

Under "Conditions" it was stated that no action would lie on the policy until the insured's obligation to pay had been finally determined. (Tr., p. 41.)

Condition 8 provided that notice to or knowledge of a company agent could not be used as a waiver or estoppel, unless an endorsement signed by an executive officer was issued. (Tr., p. 43.)

In addition to having the automobile insured, Wilbur Mehlin had placed a chattel mortgage on the car which prohibited its removal from the State of Nebraska without the consent of the mortgagee bank. (Tr., pp. 122 to 125 and 135.)

The following sequence of events that we are about to relate did not become known to the insurance company until shortly before trial of the case against Claggett in the State Court. (Tr., pp. 164 to 166.) The first *full* knowledge directly obtained from Mr. and Mrs. Mehlin came by way of sworn statements taken by the insurance company *after* the trial in the State Court. (Tr., pp. 168 to 171.) The evidence in the case at bar was produced by depositions of Mr. and Mrs. Mehlin taken in Nebraska as part of this present case. (Tr., pp. 126 to 151.)

The testimony of Mr. Mehlin established that he was the owner of the automobile and it was registered in his name. The mortgage on the automobile was in effect during October, 1947. On October 14, 1947 Mr.

Mehlin came home from work to find that his wife had left him, taking with her personal belongings and their only child and the insured automobile. She left without his prior knowledge or consent and she took the automobile without his knowledge or consent. He did not know where she had gone. He did not know Duane R. Claggett and had never heard of him. He testified that he did not give his wife permission to take the car from the State, nor to allow Claggett to drive it. (Tr., pp. 126 to 142.)

Two days after the disappearance of his wife Mr. Mehlin swore out a complaint for her arrest and started proceedings to have her return to Nebraska. *This occurred two weeks before the accident in question.* (Tr., pp. 133 to 135 and 146.)

Mrs. Mehlin testified in her deposition that she took the automobile without her husband's consent and left the State of Nebraska without his consent and without his knowledge. She left the State of Nebraska October 14, 1947, and drove to California with two men and her child. She took up residence in Richmond, California, with the Claggett family and allowed Duane Claggett to take the automobile for the purpose of having a date with a girl in Oakland. She testified that she did not have her husband's permission to drive the automobile to California; that when she left Nebraska it was her intention to come to California permanently and not to return to Nebraska. She did not have any business to transact in California on behalf of her husband, nor was Duane Clag-

gett transacting any business for her or her husband when the accident occurred. She had not known Duane Claggett before she arrived in California and she did not have a California operator's license. Under cross-examintion Mrs. Mehlin testified that she had not driven the automobile very much in Nebraska and had used it just to go to town and to do the shopping. She testified that never before had she driven the car out of the city limits of Lincoln and never before had she allowed anyone else to drive the car, and she also testified that her husband told her not to let anyone drive the car. (Tr., pp. 143 to 151.)

Let us now pick up the story from the viewpoint of the insurance company. After the appellant company sold its policy to Wilbur Mehlin in Nebraska and received the premium, it heard nothing further about the life and tribulations of Mr. Mehlin until after the insured car became involved in an accident in California. When Duane Claggett had the accident someone reported the accident to the State Farm Insurance Company office in Berkeley. (Tr., p. 153; pp. 176 to 177.) An investigator from State Farm took a statement from Claggett in which he reported on the facts of the accident and stated that he had the permission of *Mrs. Mehlin* to operate the car at the time of the accident. The investigator then interviewed Mrs. Mehlin and secured from her a verbal statement that she was on a visit in California and would be here temporarily; that she had given permission to Claggett to use the car and she was the wife of the named insured, who was still in Nebraska. (Tr., pp. 192 to 194.)

Mrs. Mehlin had signed a printed form of the report of the accident setting forth the bare details in which she related she was the wife of the named insured and that Claggett was operating the described vehicle with her permission. Mrs. Mehlin did not know how the accident happened because she was not present when it occurred. (Tr., p. 145.)

The insurance company, through its assistant claims manager, endeavored to negotiate a settlement with the attorney for the plaintiffs commencing in December, 1947, and ending in February, 1948. During this period of time the attorney representing the plaintiffs was interviewed by an adjuster for the insurance company named Gripenstraw, whose authority was limited and who had been delegated to secure an extension of time to plead while negotiations were carried on. (Tr., pp. 208 and 213.) The question of permissive use was discussed with this adjuster and he is supposed to have stated that there was no question of permissive use involved, and that the company was satisfied in that regard. (Tr., pp. 86 to 87.) The company was offering $7,500 in settlement and the plaintiffs were holding out for the limits of the policy, or at least $9,750. (Tr., pp. 87 to 89.) There was no evidence that, during this period of negotiations, appellant's agents had any notice or knowledge of the circumstances of Mrs. Mehlin's departure from Nebraska.

When settlement negotiations were broken off at the end of January, 1948, the insurance company sent its file to its attorneys to appear for Claggett, who was

the only one served with summons and complaint. The attorneys filed an answer *on the basis of the information in the file* (Claggett's and Mrs. Mehlin's statements), in which it was admitted that Claggett was driving the vehicle with the permission of Wilbur Mehlin. (Tr., pp. 19 and 20.) This answer was filed in February, 1948, and was verified by Mr. Dana, one of the attorneys for the defendant. In April, 1948, Wilbur Mehlin received a letter from the insurance company advising him of the suit and of the fact that it was in excess of his policy limits and telling him he could get his own attorney if he wished to be separately represented. (Tr., pp. 161 and 163.) Apparently Wilbur Mehlin consulted attorneys Ginsburg & Ginsburg in Lincoln, Nebraska, and these attorneys wrote a letter to Dana, Bledsoe & Smith. This letter advised Dana, Bledsoe & Smith of the circumstances of the removal of the car from Nebraska by Mrs. Mehlin. Thereafter a legal and factual investigation was commenced which was incomplete at the time the case was scheduled to go to trial in Martinez in the early part of July, 1948. (Tr., pp. 24 and 104.)

On July 2, 1948, one of the attorneys in Mr. Dana's office was required to pick up the file for the first time in order to prepare it for trial, since a continuance had been refused. The answer filed by Mr. Dana was amended by leave of Court in order to deny that the vehicle was being operated by Claggett with the consent and permission of Wilbur Mehlin. (Tr., pp. 223 to 225.) Such a denial was filed and a week's continuance was had from July 7th to July 14th to

enable defendant Claggett to get to California from Minnesota. Before the continuance of the trial and on July 3, 1948, the attorneys for the plaintiffs were advised of the questionable coverage question and of the letter that had been received from Ginsburg & Ginsburg. (Tr., pp. 220 to 223.) Between July 3rd and July 13th an effort was made to reach Claggett and the Mehlins, but it was learned that these people were no longer in California. Claggett had left the State of California in March, 1948. (Tr., p. 238.) Mrs. Mehlin had been arrested in California in December, 1947, and returned to Nebraska. This arrest had been without the knowledge of the insurance company. (Tr., pp. 164 to 171.)

On July 9, 1948, a reservation of rights agreement was taken from Claggett in Nebraska and another one was taken from him upon his arrival in California on July 13th before the commencement of the trial. (Tr., pp. 229 to 235.)

The Court in Martinez and counsel for the plaintiffs were both advised before the commencement of the trial that there was a policy coverage question involved and the attorney for the plaintiffs waived a jury trial after learning this situation. (Tr., pp. 227 to 228.)

No serious settlement negotiations had been conducted between February, 1948 and the time of trial, since they had been broken off between the attorney for the plaintiffs and the insurance company toward the end of January, 1948. (Tr., pp. 88 and 89; pp. 90 to 96.)

When plaintiff rested she had proved nothing affirmatively about Claggett's having permission to use the car. In addition to that, plaintiff proved nothing concerning any notice or knowledge by any of appellant's agents concerning lack of permissive use.

The sequence of events in the light of the then existing knowledge is of considerable importance. It is important to realize that at the time the insurance company was investigating the accident and was negotiating with Mr. Castro a complaint had been filed not only against Claggett, but also against the named insured and his wife. (Tr., p. 87.) In addition to this the complaint had alleged not only an ownership liability by reason of permissive use, but also a master and servant relationship between Claggett and the Mehlins. It was apparent, therefore, that although no service had been effected upon the Mehlins, there was a potential liability exposure which required the insurance company to defend their interests even though the claims made might be groundless. Ostensibly, from the facts obtained, Mrs. Mehlin could still be regarded as a member of the named insured's household, since she stated that she was in California on a temporary visit. The insurance company was entitled to rely on such a statement.

Under the facts known to the insurance company up until April, 1948, during which period it is claimed that waiver and estoppel occurred, there was every indication that the wife was temporarily in California on a visit with the blessing of her husband, and that

she had given permission to Claggett for the use of the car.

In April, 1948, a different set of facts was learned, which was not conclusive, and which required research concerning Nebraska law, and which required confirmation by means of statements from both Mr. and Mrs. Mehlin. Claggett was obviously not in a position to throw light on the subject. Moreover, between April and July when the case was tried none of these people was in California and no representations were being made to Mr. Castro and no offers were being made to him at said time. (Tr., pp. 92 to 96.)

SUMMARY OF ARGUMENT.

In this action by a judgment creditor, not a party to the insurance contract, the burden of proving coverage was on the appellee.

Since we are dealing with a contract made in Nebraska, the law of that state governs—even on the subject of inferences and the dispelling of them.

Under Nebraska law the burden of proving that a policy protects a person not described is on the one claiming such an extension of coverage.

A third party who seeks to recover under an insurance contract must stand in the shoes of the person he claims to be an insured, and is bound by the defenses and the lack of coverage shown to have been existing at the time he steps into those "shoes".

The reasons for policy restrictions and limitations cannot be inquired into, since the parties are free to make their contracts as they see fit.

Because the insurance policy did not name Claggett (the judgment debtor), it was necessary that appellee prove an extension of coverage by virtue of permission granted by the named insured.

Permission to use the car could not be inferred and even if it could, the evidence dispelled the inference as a matter of law.

Because the evidence failed to show that permission was given to Claggett by the named insured, an attempt to extend coverage to Claggett by means of waiver or estoppel was made by appellee.

As a matter of law the evidence fell short of establishing waiver or estoppel, because there was neither an intentional relinquishment of a known right (waiver), nor acts or declarations intended to mislead another and on which that other has relied to his detriment (estoppel).

The burden of proving waiver and estoppel was on the appellee.

The insurance policy provisions limiting the method by which and the persons by whom the Company could be bound were valid, and binding on appellee. The evidence failed to establish waiver or estoppel within the requirements of the insurance contract.

Insurance policy violations or breaches of conditions may call for a forfeiture or suspension of cover-

age, and such violations can be waived; but neither waiver nor estoppel can be relied upon to extend coverage beyond the limits of the agreement nor can waiver or estoppel be used to supply a lack of evidence that permission to use the vehicle was given by the named insured.

The declaration as to the principal place of garaging and use of the insured vehicle was violated, precluding coverage at the time and place in question.

ARGUMENT.

I.

SOME PRELIMINARY FUNDAMENTALS PERTINENT TO THIS CASE ARE WELL ESTABLISHED.

A. The burden of proving coverage on the driver, Claggett, was upon the plaintiff (appellee).

In *Lavine v. Ind. Ins. Co. of N. A.* (1933), 260 N.Y. 399, 183 N.E. 897, it was said:

> "The burden of proof rested upon the plaintiff to establish that the policy covered."

See also:

Kellner v. Travelers Ins. Co. (1919), 180 Cal. 326 at 330, 181 Pac. 61;

Manthery v. Am. Auto. Ins. Co. (1941), 127 Conn. 516, 18 Atl. (2d) 397 at 399;

Allen v. Home Ins. Co. (1901), 133 Cal. 29, 65 Pac. 138.

This burden of proof exists where permission to use a vehicle is involved.

Denny v. Royal Ind. Co. (1927), 26 Ohio App. 566, 159 N.E. 107;

Myeek v. Hartford Acc. & Ind. Co., 128 Conn. 140, 20 Atl. (2d) 735.

B. Since the insurance contract was made in Nebraska, the law of that state applies.

It is uniformly held that the law of the place of contracting governs.

Cohen v. Metropolitan Life, 32 Cal. App. (2d) 337;

Hancock v. Dorman, 108 Fed. (2d) 220.

Even in the use or in the dispelling of inferences, the law of the place of contracting may be applied. This is true where substantive rights may be involved if an inference of permissive use were allowed.

See: *Pritchard v. Norton,* 106 U. S. 124, 27 L. Ed. 104.

Also see note in 78 A. L. R. 883 at 889-90.

C. Under Nebraska law the burden of proving extension of coverage to a person not named in the policy was upon appellee.

Nebraska Statutes for 1943, Vol. 3, Section 44-378 provides as follows:

> "Where the description of the insured in the policy is so general that it may comprehend any person or class of persons, he only can claim the benefit of the policy who can show that it was intended to include him."

The insurance contract limits coverage to a permittee of the *named* insured. (Tr., p. 33.) This is in accord with the general rule and with the case law of Nebraska.

Cronan v. Travelers Ind., 18 Atl. (2d) 13;
Locke v. General Accident, 279 N. W. 55 at 58;
Col. Cas. Co. v. Lyle, 81 Fed. (2d) 281;
U.S.F.&G. v. Mann, 73 Fed. (2d) 465;
Trotter v. Union Ind., 35 Fed. (2d) 109 (9th Cir.);
Fox v. Crawford, 80 N. E. (2d) 189;
Frederiksen v. Employers, 26 Fed. (2d) 76 (9th Cir.);
Wigington v. Ocean Acc., 120 Neb. 162, 231 N. W. 770.

D. The appellee as a third party claimant must stand in the shoes of Claggett, and if there was no coverage on him, appellee cannot recover.

In *Western Machinery Company v. Bankers Ind. Co.,* 10 Cal. (2d) 488, the California Supreme Court said:

> "It is the Hynding case, therefore, which is pertinent and controlling on the question here whether the parties' agreement as to the permissive uses is binding on the injured person. In the absence of any law declaring the obligation of the insurer in that respect, the conclusion is compelling that the injured person is bound by the limitations contained in the policy."

To the same effect:

Hynding v. Home Ins. Co., 214 Cal. 743 at 748;

Metropolitan Cas. Ins. Co. v. Colthurst (C.C.A. 9th), 36 Fed. (2d) 559;

Valladao v. Fireman's Fund, 13 Cal. (2d) 322 at 328.

As was said in *Sears v. Illinois Ind. Co.,* 121 Cal. App. 211 at 222:

> "In other words, to put it in plain language, if the so-called insured is not in fact insured by the policy as in this case, at the very time the accident occurred the injured person cannot recover against the insurance carrier."

This Court has followed the general rule in *Home Indemnity Co. v. Standard Accident Ins. Co.,* 167 Fed. (2d) 919 (9th Cir.), where it quotes from *Royal Indemnity Co. v. Watson,* 61 Fed. (2d) 616:

> "The contract of insurance was issued for the protection of assured against loss, it was not designed for the protection of strangers. An injured person needs no protection against an assured who is solvent.
>
> "Quite apart from considerations of sympathy or good morals, however, it is well settled in the law that in an action of this character the injured person stands in no better position than the insured * * *."

In Nebraska we have the case of *General Casualty v. Kierstad,* 67 Fed. (2d) 523 at 525, stating the rule:

> "The right of the injured party to proceed against the insurer is dependent upon the provi-

sions of the insurance contract. He can acquire no greater right thereunder than that existing in favor of the insured."

See also:

Card v. Minn., 298 N.W. 157 (Neb.);

Pickens v. Maryland Cas. Co., 2 N. W. (2d) 593 (Neb.).

E. The reasons for limiting coverage under omnibus clauses to persons given permission by the named insured, and for requiring adherence to declarations about principal place of use and garaging of the vehicle are not the subject of debate and cannot be subjected to critical analysis. The parties may contract on their own terms and third parties cannot chip away the terms of the agreement.

This Court in *Home Ind. Co. v. Standard Accident Ins. Co.,* 167 Fed. (2d) 919 (9th Cir.), quoted the United States Supreme Court decision of *Imperial Fire Ins. Co. v. Coos County,* 151 U. S. 452, 38 L. Ed. 231 as follows:

> " 'It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The Courts may not make a contract for the parties.' "

The Nebraska Supreme Court has also stated this rule in *Johnson v. Caledonian Ins. Co.,* 251 N. W. 821 at 823:

> "* * * the appellee (insurance company) had the right to make any reasonable condition as to what risk it might assume in the contract."

The California Supreme Court also recognizes the rule by stating in *National Auto Ins. Co. v. Indus. Acc. Com.*, 11 Cal. (2d) 689 at 691:

> "The fact that the assured's liability to employees of the copartnership was no greater than that which would have attached to him had he retained the status of 'individual employer' contemplated by the policy, is of no moment in our determination of the coverage thereunder."
>
> * * * * * * *
>
> "The right of an insurer to limit its contract of coverage may not be questioned. (*Zurich Gen. Acc. Ins. Co. v. Stadelman*, 208 Cal. 151 (280 Pac. 687); *Ocean Acc. etc. Co. v. Industrial Acc. Com.*, 208 Cal. 157 (280 Pac. 690).)"

See also:

Boyer v. U.S.F.&G., 206 Cal. 273.

II.

SINCE THE INSURANCE POLICY DID NOT NAME THE JUDGMENT DEBTOR, CLAGGETT, THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH PERMISSIVE USE IN CLAGGETT SO AS TO EXTEND COVERAGE TO HIM UNDER THE OMNIBUS CLAUSE OF THE POLICY.

No evidence was offered by appellee in the trial Court to establish permission from the named insured to Claggett. The complaint alleged that one of Claggett's attorneys in the State Court action had filed an answer, verified by said attorney, admitting permissive use in Claggett. (Tr., p. 8.) The answer of appellant in the case at bar admitted the filing of such

an answer in the State Court but qualified this by alleging that leave of Court had been obtained in the State Court to withdraw said admission and to file an amended answer denying permissive use from the named insured. (Tr., pp. 19-20.) Counsel for appellee sought to read the admission to the jury without including the qualifying allegations. This bit of chicanery was not allowed by the trial Court. (Tr., pp. 79-81.)

It was and is admitted that the vehicle was owned by Wilbur Mehlin, the named insured. It is also conceded that Mrs. Mehlin gave permission to Claggett to use the car.

The evidence was uncontradicted that neither Mrs. Mehlin nor Claggett had permission from the named insured to use the vehicle. (Tr., pp. 129, 131-132, 144.) In fact, the evidence showed the use of the car by either Claggett or Mrs. Mehlin at the time and place of the accident was contrary to the wishes and without the knowledge of the named insured. (Tr., 129-130, 144, 150.) In fact, he had expressly prohibited its being loaned by his wife to any other person. (Tr., p. 150.) Indeed, the state of the evidence on permissive use was such that the trial judge felt constrained to say in his memorandum opinion:

> "It is my opinion, as I stated when the above-mentioned motion and the motion for a directed verdict were argued, that the evidence failed to support a finding that the insured named in the policy expressly or impliedly permitted the use of the automobile covered by the policy by the person

> driving it at the time of the accident. Therefore the only question to be resolved by me is whether or not under the applicable law the plaintiff may raise such an estoppel against the defendant, and whether there is evidence to support a finding of such estoppel by the jury."

This conclusion that permissive use was not established is definitely sustained by the authorities.

In Nebraska the husband is unrestricted in the enjoyment of all the incidents of ownership of personalty.

Sides Estate, 119 Neb. 314, 228 N. W. 619.

> Nebraska Statutes of 1947, Sec. 42-601 provides that "all property of the husband, both real and personal owned or claimed by him before marriage or before Sept. 7, 1947, whichever is later, * * * shall be his separate property."

Nebraska Statutes of 1947, Sec. 42-604 provides that unless in the wife's name, the husband shall have management and control over community property.

We have already pointed out that the policy itself limits the right of extending coverage under the omnibus clause to the *named* insured. This is a recognized limitation and is a regularly enforced restriction. As said in Nebraska Statutes, 1943, Vol. 3, Sec. 44-378:

> "Where the description of the insured in the policy is so general that it may comprehend any person or class of persons, he only can claim the benefit of the policy who can show that it was intended to include him."

In Nebraska, *Wigington v. Ocean Accident,* 120 Neb. 162, 231 N. W. 770 denied the coverage where the wife of a named insured allowed another to drive the car.

It was held in *Locke v. Gen. Acc.,* 279 N. W. 55 at 58:

> "A driver to whom the car has been entrusted by one who had permision to use directly from the named insured, is not an additional assured under the omnibus coverage clause."

See also:

Col. Cas. Co. v. Lyle, 81 Fed. (2d) 281;
U. S. F. & G. v. Mann, 73 Fed. (2d) 465;
Trotter v. Union Ind., 35 Fed. (2d) 109 (9th Cir.);
Fox v. Crawford, 80 N. E. (2d) 189;
Fredericksen v. Employers, 26 Fed. (2d) 76 (9th Cir.).

Statements in an abandoned or superseded pleading cannot be used as evidence of the fact of permission.

Kambourian v. Gray, 81 Cal. App. (2d) 783;
Gajanich v. Gregory, 116 Cal. App. 622;
Weissbaum v. Eibeshutz, 211 Cal. 170.

Lack of permission in Claggett from the named insured was established as a matter of law and there were no inferences to assist the appellee.

Engstrom v. Auburn, 11 Cal. (2d) 64;
Kimbles v. Kelly, 6 Cal. App. (2d) 91;
Montanya v. Brown, 31 Cal. App. (2d) 642 at 645.

It is also the rule in Nebraska that any inference or presumption of permission vanishes in face of positive evidence.

Myers v. McMaken, 276 N. W. 167 (Neb.);
Harrell v. Peoples City Mission, 267 N. W. 344 (citing the California case of *Hanchett v. Wiseley,* 107 Cal. App. 230);
Phillco v. Hefnider, 2 N. W. (2d) 31 (Neb.);
Witthauer v. Paxton-Mitchell Co., et al., 19 N. W. (2d) 865.

In the latter two cases there was a nonsuit and a reversal, respectively.

Appellee, having failed to prove permissive use, sought to establish it by reliance upon principles of waiver and estoppel.

III.

THE EVIDENCE WAS INSUFFICIENT, AS A MATTER OF LAW, TO ESTABLISH EITHER WAIVER OR AN ESTOPPEL WITH RESPECT TO PERMISSIVE USE.

The burden of proof of estoppel and all its elements is on the party pleading it.

State v. Cheyenne Co., 241 N. W. 747, 123 Neb. 1.

In *Chester Pyle Co. v. Fossler,* 200 Cal. 204 at 210, the Court said:

"Waiver always rests upon intent and knowledge."

Similarly *Aronson v. Frankfort,* 9 Cal. App. 473 at 480, holds:

> "A waiver in law is the intentional relinquishment of a known right; and the burden is upon the party claiming such waiver to prove it by such evidence as does not leave the matter doubtful or uncertain."

The evidence relied upon by appellee to show waiver and estoppel fails to show *knowledge* on the part of appellant of the facts which would have warranted its declining coverage. (See a resumé of the evidence relied upon in the appendix pages i to vi.) The appellant offered evidence that showed lack of knowledge at the time it was negotiating with appellee. (See appendix, pp. vi to xv.) Appellant also proved that it obtained a reservation of rights agreement from Claggett and from both Mehlins, the former before trial in the State Court (Tr., pp. 231-235; 250-251) and that it advised counsel for appellee of the policy defenses before trial. (Tr., pp. 223, 227, 228-229.)

The elements of waiver and estoppel that must be proved are well established.

In *McDaniels v. General Ins. Co.,* 1 Cal. App. (2d) 454 at 460, the rule on waiver is stated:

> "To constitute a waiver there must be an existing right, a knowledge of its existence, and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It is a voluntary act and implies an abandonment of a right or privilege—an election to dispense with something of value or to forego

some advantage which one might, at his option, have demanded or insisted upon. In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to."

The rule is clearly stated in *Mirich v. Underwriters at Lloyds,* 64 Cal. App. (2d) 522 at 530:

"One of the essential elements of estoppel and waiver is knowledge of the facts. There can be no waiver of the right to charge fraud, misrepresentation, or breach of warranty except by acts and conduct subsequent to the discovery of the facts, and by conduct evidencing an actual intention to relinquish a right. (*McDaniels v. General Ins. Co.* (1934), 1 Cal. App. 2d 454 (35 P. 2d 394, 36 P. 2d 829); *California-West. States etc. Co. v. Feinsten* (1940), 15 Cal. 2d 413 (101 P. 2d 696, 131 A.L.R. 608).)"

In the foregoing case the insurance company defended the action to a conclusion, although it learned of the insured's fraud during the trial. The Court pointed out:

"The company undertook the defense of the suit because it was required to do so under its policy, and it was placed in that position through the misrepresentation of Dr. Balsinger. He could not justly complain because the company's attorney protected his rights until the trial was finished."

* * * * * * *

"Plaintiff's right to recover on the policy can be no better than that of Dr. Balsinger, and the claim of waiver or estoppel asserted by her has no validity. (*Kindred v. Pacific Auto. Ins. Co.* (1938), 10 Cal. 2d 463, 466 (75 P. 2d 69), and cases there cited.)" (Page 531.)

See also:

Cohen v. Metropolitan Insurance Co., 32 Cal. App. (2d) 337 at 348.

Nebraska has followed the same rule. In *George v. Guarantee Mut. Life Co.,* 13 N. W. (2d) 176 (Nebraska Supreme Court) where an agent of the company had some knowledge that assured had been under treatment the Court said:

" 'Waiver' is an intentional relinquishment or abandonment of a known and existing right, benefit or advantage, and there can be no waiver unless the party against whom it is invoked was in possession of material facts and acted with intent to waive * * *."

See also:

Klanecky v. Woodmen, 254 N. W. 577, 126 Neb. 809;

Sawyer v. Sovereign Camp, 181 N. W. 191, 105 Neb. 395;

Nash v. Baker, 58 N. W. 706, 40 Neb. 294;

Hamilton v. Home Ins., 61 N. W. 93, 42 Neb. 883;

Williams v. Neely, 134 Fed. 1.

Keeping in mind that waiver and estoppel must be predicated upon proof of knowledge by the party to

be estopped or the party who is claimed to have waived his rights, there is no evidence of any knowledge by anyone until April, 1948. Even at this time the knowledge was inconclusive and incomplete. The facts were not definitely established until August, 1948, when sworn statements were taken from Mr. and Mrs. Mehlin. By that time a judgment had already been rendered against Claggett for $30,000.

At the time the insurance company was negotiating with plaintiffs' attorney and at the time Claggett's answer was filed the uncontradicted evidence shows that neither the insurance company nor its attorneys had any notice or knowledge that Claggett was driving the vehicle without the permission of Wilbur Mehlin. Nor was there any evidence to justify a conclusion that the assumption of permissive use was not wholly warranted under the facts obtained from Claggett and Mrs. Mehlin.

Another element of estoppel or waiver is lacking. The evidence was insufficient as a matter of law to show any change of position by plaintiff or reliance to her detriment upon any conduct of the insurer's representatives. The evidence on this subject matter is summarized at pages i to xv in the appendix.

The general rule is set forth in 29 Am. Jur. "Insurance" paragraph 855:

> "Where knowledge is acquired after loss, the rights of the parties are substantially fixed, and the insured cannot be prejudiced by the silence or nonaction of the company in respect of a breach of the policy which occurred before loss."

In California the case of *McDaniels v. General Ins. Co.,* 1 Cal. App. (2d) 454 involved a claim of waiver and estoppel based upon the insurer's proceeding with the trial after learning of the assured's breach. The Court held there was no estoppel and said:

> "No advantage over appellant was gained for the insurer by proceeding with the trial, nor did appellant suffer any disadvantage therefrom. No change of position by appellant was caused thereby, nor did the rights of any other person intervene because thereof. Despite the fact that respondents continued to participate in the trial in the absence of the assured, who was a material witness, appellant secured a judgment for an amount double the liability of respondents as stated in the insurance policy. Surely neither disadvantage to appellant nor advantage to respondents is reflected by such result."
>
> * * * * * * *
>
> "Here appellant lost no advantage which he had a right to claim. He was not entitled to any right to try his action for damages without opposition nor as a default case. The contract of insurance obligated the respondents to defend the suit in the name and on behalf of the assured. This duty respondents undertook to discharge when suit was brought against the assured, and continued to perform without definite knowledge of breach or intended breach until about one month before the actual trial, when they gave the notice of breach and nonwaiver to the assured as above recited." (Pages 460-461.)

In our case the appellee's attorneys opposed a continuance of the trial in the State Court, even after

learning of the policy defenses being raised by appellant's counsel at that time. (Tr., pp. 223, 225, 227.) Both counsel were on equal footing at that time as far as learning the facts about permissive use. There was still time for service of summons on Mr. and Mrs. Mehlin as nonresidents under Section 404, California Vehicle Code. (Appendix, p. xv.) In fact appellee was successful at the trial at Martinez in securing a judgment against Claggett for $30,000. There was no evidence of Claggett's insolvency or lack of ability to pay. There was no evidence that any different facts on permissive use could have been developed by appellee. There was no evidence that a settlement could have been obtained for a figure satisfactory to both parties—*if all the facts had been known by both parties.* The burden of proof of waiver and estoppel being on appellee, these omissions in the proof were fatal to appellee's claim.

In Nebraska the rule is that the claimant must show that he acted to his *detriment* or that he altered his position in some material respect.

Oak Creek Bank v. Helmer, 80 N. W. 891 (Neb.);

National Aid v. Brachter, 91 N. W. 379 (Neb.), 93 N. W. 1122;

Haschenberger v. Dennis, 225 N. W. 25 (Neb.).

It has been pointed out that the rights of the parties under the policy became fixed at the time the accident happened. As was said in *Commercial Standard v. Robertson,* 159 Fed. (2d) 405 at 408:

> "The basis of an estoppel resting upon waiver is reliance by one upon the act or representation of another, and subsequent loss or detriment because of such reliance. The rights of the parties here were fixed at the time of the accident, and nothing that occurred afterwards affected them."

Royal Ind. v. Watson, 61 Fed. (2d) 616, indicates quite correctly:

> "The contract of insurance was issued for the protection of the assured against loss, it was not designed for the protection of strangers. An injured person needs no protection against an assured who is solvent."

The leading case in Nebraska is *Wigington v. Ocean Accident,* 231 N. W. 770, where it was held under facts very similar to the ones at bar:

> "As to the insurance company's interference by furnishing an attorney in behalf of Crawford (Claggett in our case), he not having been an 'insured', (having permission from the wife and not from the named insured), such interference could not give rise to an estoppel as herein contended."

It is difficult to see how strangers to the contract can claim that coverage has been extended to another stranger to the contract on the basis of alleged negotiations by the insurer *after the facts* have already been established and *after* the loss has already occurred.

As has been indicated by language quoted from the decisions, no detriment can come to one who never had any rights under the contract as of the time of loss. No right exists in strangers to the contract to have their claims paid without contest. The existence of an insurance policy is a windfall. If the claimant is successful in obtaining a $30,000 judgment against the man sued, he could not ask for more—and cannot claim detriment therefrom. Before trial appellee's attorney was told of the probable lack of coverage and was told that a nonwaiver agreement had been secured. Despite this information, he elected to insist upon an immediate trial without further effort to investigate the facts or to resume negotiations for settlement with the company. By then the company had learned enough about lack of coverage to be on a wiser footing in settlement discussions than it had been previously in negotiating when its attorneys were not yet in the case.

It is obvious that there was no proof of detriment to appellee as a result of any negotiations or trial in the State Court.

The insurer is under no obligation to notify strangers to the contract of the nonwaiver agreement. This is made clear in the Nebraska case of *Wigington v. Ocean Accident,* 231 N. W. 770. Similarly, in *Hodges v. Ocean Acc. & G. Corp.,* 18 S. E. (2d) 28, the insurer defended without telling the injured party of lack of coverage. A directed verdict for the defendant was affirmed. In the case of *Suydam v. Pub-*

lic Ind. Co., 161 Atl. 449 (N.J.), a reservation of rights or nonwaiver agreement was made and the insurer's attorneys defended without advising the injured party of the reservation of rights. In holding against a claim of waiver and estoppel the Court said:

> "Since the injured party in this case had no interest in the contract between the insurer and insured until after judgment and the return of execution unsatisfied, he was not entitled to notice of reservation of rights by the insurer or the waiver of those rights by the insured, both of which were matters occurring prior to the accrual of any interest in the policy of the party injured."

A similar ruling is found in *La Roche v. Farm Bureau Mutual,* 7 Atl. (2d) 361 (Pa.).

In summary, therefore, neither waiver nor estoppel was shown by appellee because conduct relied upon occurred before any knowledge of the lack of permissive use was established. Secondly, conduct immediately preceding and during trial was known by appellee to be under a nonwaiver agreement. Thirdly, the evidence failed to establish a change of position to the detriment of appellee.

Moreover, since appellee must stand in the shoes of the insured and is bound by the terms of the insurance contract, there is another fatal obstacle to the claim of waiver and estoppel.

IV.

THE PROVISIONS OF THE POLICY AGAINST WAIVER AND ESTOPPEL EXCEPT IN WRITING AND EXCEPT BY DULY AUTHORIZED OFFICERS ARE VALID PROVISIONS AND ARE RECOGNIZED AS SUCH BY THE CASES.

Analysis of appellee's claims about waiver and estoppel indicates that she relied upon certain acts of an adjuster in his investigation of the accident, upon certain conversations between an assistant claims manager and the attorney for the plaintiff concerning settlement, upon the alleged verbal statements of an adjuster sent to get an extension of time to the effect that the problem of permissive use was not involved and that the company was satisfied on that subject, and upon an admission in a pleading in another action where the issue was not raised nor involved and the admission was withdrawn. None of these things satisfy the requirements. The authority to make a contract of insurance on behalf of the company was not shown in any of these people. The conduct relied upon falls short of establishing a change in the policy provisions in the manner required, even assuming the authority existed.

The policy required that the company defend claims against the insured, even though groundless. (Tr. p. 32.) The action in the State Court was against Mehlin as well as against Claggett. The contract permitted the company to negotiate for settlement of such claims as well as requiring it to defend them. In connection with these matters the policy stated:

> "Acts of the Company or its representatives in performing the duties or exercising the rights under this agreement shall not operate to waive the Company's rights nor estop it from asserting any defense under the policy."

In addition to the foregoing the policy conditions contained the following:

> "8. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy signed by an executive officer of the Company."

There were no endorsements issued and no executive officer was shown to have waived or changed any of the pertinent policy terms in this respect.

In California such policy restrictions are recognized and are given effect.

> *Gladding v. C.F.M.F.,* 66 Cal. 6 at 8;
> *Hargett v. Gulf Ins. Co.,* 12 Cal. App. (2d) 449 at 454.

In discussing the subject of waiver and estoppel care must be taken to distinguish cases which deal with a breach of condition or warranty resulting in a forfeiture. Our case, on the omnibus coverage question, does not come in that category. No question of

forfeiture for breach of condition is involved. We have a valid insurance contract at all times. The question to be discussed later concerning place of use and garaging of the car is a different problem.

As long as the distinction between forfeiture cases and coverage cases is kept in mind, it can be determined quite readily that Nebraska follows California in holding that nonwaiver provisions and limitations in a policy are valid and to be given effect.

German Ins. Co. v. Heidink, 46 N. W. 481 at 483, 30 Neb. 288;

McElroy v. Metropolitan Life, 122 N. W. 27. (In this case a directed verdict is involved);

Jensen v. New York Life, 59 Fed. (2d) 957 (Neb.);

Card v. Minn., 298 N. W. 157;

Pickens v. Maryland Cas., 2 N. W. (2d) 593. (This involves the violation of the place of use provision.)

In the Nebraska case of *Fidelity Mutual Fire v. Lowe,* 93 N. W. 749 at 752, the Court says:

> "Nothing herein is intended to qualify or modify the doctrine established in this Court that, where a policy provides that no waiver of any of its conditions will be valid until 'the same be indorsed in writing on the policy and signed by the president or secretary at the home office only', as provided in the policy under consideration, it will not be permitted to a party to show waiver by any other or different modes."

See also the leading case of *Northern Assurance Co. v. Grand View,* 183 U. S. 108, 46 L. Ed. 213 at 235. This case came up from Nebraska and recognizes restrictions against policy changes by means of unauthorized parol agreements.

See also:

American Fire v. Landfare, 76 N. W. 1068 at 1070 (Neb.).

The persons dealing with appellee in the case at hand were *claims* men—not underwriting or coverage men. None was an executive officer. *No* written endorsement was issued which purported to change any condition let alone waive any. Proof of permission was at no time dispensed with by any writing or by any executive officer. Such requirements are standard in policies of this kind, and no one can rely on mere settlement negotiations or appearances for a person sued to work a change in the insurance contract or to supply an absent fact.

Completely determinative of the principal issue in this case (i.e. lack of permissive use) and clearly illustrative of the distinction between forfeiture and nonforfeiture cases is the following line of authorities.

V.

INSURANCE COVERAGE CANNOT BE EXTENDED BY MEANS OF WAIVER OR ESTOPPEL. A FAILURE OF PROOF TO BRING SOMEONE WITHIN THE COVERAGE PROVISIONS OF THE POLICY LIKEWISE CANNOT BE SUPPLIED BY WAIVER OR ESTOPPEL.

It must be conceded in this case that permission was not given by the named insured and a failure of proof in this regard existed unless by waiver or estoppel it could be supplied. The fact of permission cannot be created by acts or conduct after the happening of the accident. The facts have occurred and cannot be changed by what is done or not done, once the rights of the parties became fixed at the time of the accident.

The appellee attempted to extend the coverage of the policy to someone not designated in the policy as being covered. They could not do this by means of proof of waiver or estoppel.

In *Conner v. Union Automobile Ins. Co.,* 122 Cal. App. 105 at 110 it is held that a contract of insurance may not be reformed, so as to create a liability for conditions which are excluded by the terms of the instrument, by means of the doctrine of waiver.

In *John Hancock etc. Ins. Co. v. Markowitz,* 62 Cal. App. (2d) 388 at 397, it is held that the doctrine of waiver cannot be used to the extent of broadening the coverage so as to make a policy cover a risk not within its terms.

In 45 *C. J. S.* 617, note 39, it is said:

> "The doctrine of waiver or estoppel cannot be successfully invoked to create a primary liability,

> or a liability for a benefit not contracted for at all, *or to supply a failure of proof that a loss was covered by the policy.*" (Emphasis ours.)

It would seem that Nebraska recognizes this rule by the decision in *Card v. Minn.,* 298 N.W. 157, where the evidence showed that the insurance agent had knowledge of a sale and mortgage on the property, but the policy was issued only in the name of the seller—mortgagee. It was held that a stranger to the contract, namely the buyer or mortgagor, could not claim that the coverage was extended to include his interests by virtue of the doctrine of waiver or estoppel.

Heime v. Glens Falls Ins. Co., 222 N.W. 731 (Mich.) holds that an estoppel cannot be used to assert that a policy issued on a GMC truck should include a Union truck.

In *Macomber v. Minn. F. & M.,* 204 N.W. 331, it is held that estoppel cannot extend coverage to the husband when the property was in the wife's name and the insurance contract was not with the husband. The Court said:

> "But the difficulty of applying the doctrine of estoppel in this case arises from the fact that the plaintiff never had any contractual relations with the defendant companies, and the doctrine of estoppel will not apply to create a contract that never existed."

A good analysis of the distinctions is to be found in *Washington Nat. Ins. Co. v. Craddock,* 109 S.W. (2d) 165 (Texas). The policy in that case was an

accident policy for accidental injury. It excepted, however, injury from gunshot wounds. The complaint alleged that the insurance company knew that the injury for which he made claim was a gunshot wound and the agent who knew it furnished him with the blanks to fill out, which he mailed to the company, stating the nature of his accident. The company paid him for eleven weeks and then declined to make any further payments. It was claimed that the company waived the condition excepting gunshot wounds by making the payments for eleven weeks and was estopped from denying its liability. A demurrer was sustained and this was affirmed on appeal. The Court said:

> "The question presented is not whether the act of the Insurance Company in making payments would constitute a waiver of its right to forfeit the policy on account of some breach by the insured of its terms, but is whether a contractual liability may be created by a waiver. By its policy the Insurance Company did not assume any liability for the risk declared upon and no consideration moved to it after the accident for the assumption of such liability. The insured seeks to create that liability by invoking the doctrine of waiver. That doctrine cannot be made to serve that purpose."

The Court also quotes with approval from 32 *C. J.* 1317 as follows:

> "A waiver cannot operate to bring within the terms of the policy a loss which is expressly excepted therefrom or supply a failure of proof that a loss was covered by the policy."

In *Rosenberg v. General Accident,* 246 S.W. 1009 (Wis.) the adjuster was shown to have known that the goods involved in the loss were in the east half of a building and not in a portion covered by the policy. It was claimed that conduct after the loss with such knowledge amounted to a waiver and the Court said:

> "* * * failure to prove a loss covered by the policy could not be supplied in this manner."

In *Pierce v. H. Life Assn.,* 272 N.W. 543, a directed verdict was affirmed where the Court said that waiver and estoppel could not supply a failure of proof that the loss came within the terms of the policy. There it was necessary to prove that the death occurred prior to the age of sixty.

In *Carnes & Co. v. Employers,* 101 Fed. (2d) 739, the policy covered farm machinery, Crane fixtures and paints. The hauling of butane gas was not covered. The evidence showed that an agent of the insurance company knew when the policy was renewed that the insured was hauling butane gas. In stating the points involved the Court said:

> "Appellants seek to bind the insurance company by the doctrine of waiver and estoppel. * * * They point out waiver and estoppel and appellants would have them * * * (referring to cases) apply where coverage is sought to be extended to the hauling of butane gas, a thing the policy did not originally cover. This cannot be done.
>
> "It is well settled that conditions going to the coverage or scope of a policy of insurance, as distinguished from those of furnishing a ground

for forfeiture, may not be waived by implication from conduct or action. The rule is that while an insurer may be estopped by its conduct or its knowledge from insisting upon a forfeiture of a policy, the coverage or restrictions on coverage cannot be extended by the doctrine of waiver or estoppel."

In *Van Meter v. Franklin Fire,* 164 Fed. (2d) 325 at 326-327 (9th Cir.), the insurance covered property only while in the State of Washington. It was removed to Oregon and it was claimed that the company was bound by waiver and estoppel through knowledge of the company concerning the change of location. In stating the case the Court said:

"The claim was presented in the trial court that the provision in the instant case is a condition rather than a coverage restriction and hence within the doctrine of waiver or estoppel. The policy in providing that the equipment is covered only while in the State of Washington constitutes a coverage restriction in that it covers property only within a given area, and the trial court was correct in so ruling."

Judgment of dismissal was affirmed.

In *Commercial Standard v. Robertson,* 159 Fed. (2d) 405, at 408, the policy required as a restriction for coverage that a certificate from the Interstate Commerce Commission be obtained by the operator of the vehicle. In stating the case the Court said:

"The insurer did not learn that no certificate had issued until after the accident. The basis of an estoppel resting upon waiver is reliance by one

upon the act or representation of another, and subsequent loss or detriment because of such reliance. The rights of the parties here were fixed at the time of the accident, and nothing that occurred afterwards affected them."

In *F. & G. Fire Corp. v. Bilquist,* 99 Fed. (2d) 333 at 335 (9th Cir.) the coverage was on property while occupied only for dwelling house purposes. This was held to be a restriction on coverage and not a condition and not the subject of waiver or estoppel.

In *Antone v. New Amsterdam,* 6 Atl. (2d) 566 (Pa.), a policy was issued on an Austin car in the name of Wayne Watterson. Another policy was issued on a Dodge in the name of C. H. Watterson. Wayne died and C. H. Watterson used the Austin and an employee of his had an accident. As a result of this accident a suit was filed against Watterson and he tendered the defense to the insurance company. The company undertook the defense until it learned of the facts and then it withdrew the defense for Watterson. Judgment was obtained against Watterson and a suit was brought against the company on the judgment obtained. The Court held as follows:

"The question is whether the Courts will apply the principle of estoppel to an insurance company which never had an indemnity contract with a defendant * * * upon which therefore no liability ever rested, so that it cannot challenge the total failure of any contractual relationship between it and another party, basing the application of estoppel upon the facts that the company took over the investigation of the case in connec-

tion with the personal injury sustained and conducted the preliminary proceedings prior to the trial of the cause.

At the time of the accident * * * C. H. Watterson had acquired no rights under the policy covering this Austin touring car. He was then a total stranger to the insurance policy herein invoked. There was not the slightest liability ligament existing between the insurer of Wayne Watterson and the defendant in the action of tort. The cases in Pennsylvania and elsewhere that recognize the estoppel theory in insurance contract cases are all cases where some contractual relationship existed between the parties. Before a court can say that a company is estopped to deny that 'it waived the condition of the policy', there must be a covering policy. But where there is no policy, there is no condition to be waived. By undertaking the defense an insurer elects to treat the insured's cause of action, if he had any, *as covered by the contract.*

Here the doctrine of estoppel is being used, not to make a contract operative, but to create a contract where none existed."

* * * * * * *

"What is insisted upon is not really the waiver of a forfeiture, or an equitable estoppel insisting upon a condition of the policy, the violation of which would otherwise work a forfeiture * * *. What is here sought is not to prevent a forfeiture, but to make a new contract. * * * We do not understand that the doctrine of estoppel or waiver goes that far. After a loss accrues, an insurance company may, by its conduct, waive a forfeiture; or by some act before such loss it may induce the

> insured to do or not to do some act contrary to the stipulations of the policy, and thereby be estopped from setting up such violation as a forfeiture; but such conduct, though in conflict with the terms of the contract of insurance and with the knowledge of the insured, and relied upon by him, will not have the effect to broaden out such contract so as to cover additional objects of insurance or causes of loss."

The Court goes on to say that the third party, Antone, cannot invoke estoppel because he is a "stranger".

> "In this proceeding Antone's rights against the insurer can rise no higher than C. H. Watterson's."

In *Demy v. Royal Indemnity,* 159 N. E. 107 at 109, a policy was issued on a Cadillac agency when cars were used in the business. It also extended to employees. The driver took one of the cars on a trip of his own, not for the company. In the action brought against the company and the employee, the insurance company defended both. The Court held there was no estoppel and said:

> "The terms of the policy cannot be enlarged or diminished by judicial construction."

In *Home Indemnity Company v. Standard Accident Insurance Company,* 167 Fed. (2d) 919 (9th Cir.) the rule is clearly stated by this Court as follows:

> "In such a situation, when a party seeks to read something into the contract of insurance that

is not there, a court must perforce say, with Shylock,

'Is it so nominated in the bond? * * * I cannot find it; 'tis not in the bond.'

This is the teaching of the cases in California and elsewhere. In *Carabelli v. Mountain States Life Ins. Co.,* 8 Cal. App. (2d) 115, 46 Pac. (2d) 1004, 1006, hearing denied by the Supreme Court of that State, the Court said: 'The general rule is that an insured must bring himself within the express terms of the policy before he is entitled to recover thereon, and where these terms are plain and explicit, the courts cannot create a new contract for the parties by a forced construction of such plain and explicit terms'."

In *Kabinski v. Employers Liab.,* 8 Atl. (2d) 605 (N. J.), it was held company did not enlarge the scope of its undertaking by continuing with the defense of the action after the driver failed to appear at the trial.

It seems clear that we are dealing with a question of how a limited coverage may be extended to persons not described by name in the policy. The question of a breach of condition or a forfeiture is not involved. Hence, what is being attempted is the supplying of evidence to fill a gap in the proof. This is not the proper function of waiver or estoppel. 45 C.J.S. 617, seems to nail the idea to the mast quite succinctly and irrefutably:

"The doctrine of waiver or estoppel cannot be successfully invoked to create a primary liability,

or a liability for a benefit not contracted for at all, *or to supply a failure of proof that a loss was covered by the policy"* (Emphasis ours.)

VI.

THE DECLARATION CONCERNING THE PRINCIPAL PLACE OF USE AND GARAGING OF THE VEHICLE WAS BREACHED WHEN THE WIFE BROUGHT THE VEHICLE TO CALIFORNIA WITH THE INTENTION OF REMAINING HERE.

The insurance policy in the schedule of declarations which form a part of the consideration for the issuance of the policy and the application state that the principal place of use and garaging of the vehicle will be in Lincoln, Nebraska.

In the case of *Purcell v. Pacific Auto.,* 19 Cal. App. (2d) 230, the declaration stated that the vehicle would be principally garaged and used in Bakersfield. Instead it was taken to Los Angeles and eight hours after the effective time of the policy the accident occurred. It was shown that the intention of the insured was to use the vehicle in Los Angeles and not in Bakersfield. It was held that this was a breach and avoided the policy.

See also *Kindred v. Pacific Auto.,* 10 Cal. (2d) 463. This case held the breach vital regardless of how the provision was construed.

A change in location and use from Nebraska to California is a material change and involves a greater exposure to traffic hazards, particularly where

the named insured with whom the insurance company is dealing has no power to control the selection of persons to drive the vehicle, nor the areas in which it is to be used. Such a change in location involves a material breach warranting the avoidance of coverage.

C.I.T. v. American Central Insurance Company, 18 Cal. App. (2d) 673.

The declaration in the insurance contract is a promissory warranty and does not need to be labeled as such to make it a warranty. The policy states that it is issued in consideration of the premium and the statements contained in the declarations. The declaration states unequivocally that the automobile "will be principally garaged and used in the above town, county and state." This statement is in nowise modified by the general restriction under conditions that the policy applies only to accidents which occur while the automobile is within the United States, its territories or possessions, Canada or Newfoundland. This very broad term is clarified by the following, "and used for the purposes stated as applicable thereto in the declarations." Such a broad territorial coverage is quite different from the question of principal garaging and using of the vehicle.

In our case the wife intended to stay in California and this question of intention was made important in the *C.I.T.* case, supra.

In California the Insurance Code on the subject of warranties, states, Section 442:

"A particular form of words is not necessary to create a warranty."

Section 444 of the Insurance Code says:

> "A warranty may relate to the past, the present, the future, or to any or all of these."

Section 445 of the Insurance Code states:

> "A statement in the policy, which imports that there is an intention to do or not to do a thing which materially affects the risk, is a warranty that such act or omission will take place."

It goes without saying that the operation of a vehicle on the highway of California, around the metropolitan area of San Francisco, materially increases the risk of accident over the risk that would be involved in the operation of such a vehicle in the State of Nebraska. It is also a material increase of the risk to have the vehicle in the possession of a fugitive who has stolen a car, and a further added increase to have it continuously in the possession of the wife who has been consorting with other men and has indicated by her actions an irresponsible conduct.

The declaration concerning the principal place of garaging and use has been held to be a promissory warranty as indicated in *Appleman, on Insurance,* Vol. 4, page 528, where he says:

> "* * * but the majority of courts have held it to be a promissory warranty or continuing condition of the insurance, which would be avoided by permanent change in location without notice * * *." (Citing *Marone v. Hartford,* 176 A. 320, *Lummus v. Fireman's Fund,* 83 S. W. 688, *North River Ins. Co. v. Lewis,* 119 S. E. 43.)

In the Federal District Court for Los Angeles we have the case of *Connecticut Indemnity Co. v. Howe,* 41 Fed. Supp. 222. In that case there was the similar policy declaration that the automobile would be principally garaged and used in the above town, county and state, namely Palo Alto. The policy was issued to a bartender who worked at "Dinah's Shack". The accident happened in Los Angeles where the assured had gone about a month before the accident and had taken up residence in one of the suburbs of Los Angeles. He apparently was attempting to establish the business of operating a driving school in Southern California. The investigator asked the assured if it was his intention to continue to live in Los Angeles and he answered, "I can't say about that." The District Court of the United States in Los Angeles held that this was a breach of the policy and that there was no liability on the insurer for the accident.

In Nebraska the rule is stated in *Sanks v. St. Paul,* 267 N. W. 454 at 458:

> "An act of the insured that constitutes a clear breach of a promissory warranty in an insurance contract and which contributes to the loss will prevent a recovery for such loss."

No completely analogous case has been found in Nebraska on this point, but one that closely parallels it is *Johnson v. Caledonian Ins. Co.,* 251 N. W. 821 (Neb.). The policy covered a horse while in a certain pasture. A removal permit could be obtained if it was desired to move the horse. The horse was moved once under such a permit. At the time in question,

however, the horse had been placed in a different pasture without the permit and while there it was struck by lightning. In holding that there was no coverage, the Court said:

> "the appellee (ins. co.) had the right to make any reasonable condition as to what risk it might assume in the contract. * * * the insurance company by the very terms of the contract had the right to know where the stock was being kept and under the terms thereof was privileged to discontinue the insurance if it was not satisfied with the risk and the continuance of the same in the new location. * * *
>
> It can be said with some degree of certainty that locations differ with respect to lightning hazards because of the nature of the land and soil conditions, the presence of high trees * * *."

The Court went on to state that the unauthorized removal contributed to the loss.

CONCLUSION.

It is respectfully submitted that the evidence was insufficient as a matter of law to establish that appellant's insurance policy covered Claggett at the time of the accident.

There can be no dispute that Claggett was not operating the car with the permission of the named assured. The proof fell short on that vital point.

Evidence of permission could not be supplied by means of a claim of waiver and estoppel. Waiver

and estoppel cannot be used to extend coverage where none existed before.

Even the evidence on waiver and estoppel failed as a matter of law to establish either doctrine because there was no proof that the defendant, or any of its authorized agents had the requisite knowledge of the facts at the time negotiations were pending. In addition the appellee failed to establish that any different result could have been obtained by investigation or by a default judgment.

The effort to establish waiver and estoppel could not be allowed in view of the restrictions in the policy on those subjects.

A promissory warranty was breached and avoided coverage because of the change of principal place of garaging and use of the vehicle. No doctrine of waiver or estoppel was asserted or established with reference to this defense.

It is respectfully submitted that the judgment entered on the verdict should be reversed with directions to the trial Court to enter judgment in favor of the defendant.

Dated, San Francisco, California,
July 5, 1950.

LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

Section A.

The witness, Augustus Castro, testified on behalf of appellee. (Tr., pp. 81 to 105.) He said that after he was employed as attorney for plaintiff ten days after the accident he wrote a letter to the insurance company suggesting settlement. (Tr., p. 83.) Four days later a reply was received in which the insurance company stated that they had been unable to find any policy issued to Mr. Claggett, the driver of the car. (Tr., p. 84.) About nineteen days later he said that an insurance adjuster named Dennis telephoned to advise that they had located an insurance policy on the automobile involved in the accident. Twenty-eight days later an insurance adjuster named Gripenstraw called upon Mr. Castro. (Tr., p. 85.)

Mr. Castro testified that he had a conversation with Mr. Gripenstraw (this was two months after the accident) in which Mr. Gripenstraw said they had an insurance policy covering this automobile and that they were interested in seeing if the case could be settled. Mr. Castro asked Mr. Gripenstraw, who was a claim adjuster, what the policy limits were and Mr. Gripenstraw told him he was not permitted to give that information. Mr. Castro then said he thought the policy limits should be paid and was advised by Mr. Gripenstraw that the company would not do that because they had a defense to the case. Mr. Castro then asked what possible defense there was, stating

that the only issues involved were negligence and permission to use the automobile and asked Mr. Gripenstraw if there was any question about the permission. Mr. Gripenstraw is supposed to have replied: "No there isn't. We are satisfied that Mrs. Mehlin had the permission to bring the automobile out here and that Mr. Claggett had her permission to use it." (Note that this conversation took place several months before anyone in California knew that Mrs. Mehlin had come to California without the knowledge or permission of her husband and before anyone in California knew that Mrs. Mehlin had been arrested and returned to Nebraska for the unpermitted taking of the automobile.) Mr. Castro went on to testify that Mr. Gripenstraw offered $7500 in settlement.

A later telephone conversation was described by Mr. Castro in which he called Mr. Gripenstraw and told him $7500 was not acceptable. Mr. Gripenstraw said the California office had no authority to pay the policy limits and would have to contact their office at Bloomington, and that a board would have to pass on any payment of policy limits. Later Mr. Castro was told that the offer would not be increased over $7500. (Tr., p. 87.)

The two conversations with Mr. Gripenstraw were January 13, 1948 and January 22, 1948. On January 28, 1948, about three months after the accident, Mr. Hunt of the insurance company called Mr. Castro and stated that before turning over the case to attorneys a last effort for settlement was suggested. A fig-

ure of $8500 to $9,000 was mentioned and after Mr. Castro consulted with his client he called Mr. Hunt on February 5th and advised that he would not accept less than $9,750. The settlement negotiations were terminated and Mr. Castro was advised that the case would be turned over to the insurance company lawyers. (Tr., pp. 88 and 89.)

There were no further communications between Mr. Castro and the insurance company or the attorneys, except that an answer was served and filed about February 17, 1948. (Up to this time no information had been received by anyone in California concerning the true circumstances of the automobile's presence in California.)

At the time the answer was filed in the State Court neither the insurance company nor its attorneys had information concerning Mrs. Mehlin's theft of the automobile, or of her arrest and return to Nebraska. This answer was filed some three and one-half months after the accident had occurred and at least three months after the attorneys had commenced to represent the plaintiff. Mr. Castro testified that no investigation was made after the filing of that answer concerning the permissive use since the answer had admitted permissive use and Mr. Gripenstraw had stated that there was proper permission. Mr. Castro testified that he relied upon the representation of Mr. Gripenstraw and on the admission in the answer, and consequently did not investigate the subject. (Tr., pp. 91 and 92.) (There was no showing that any investi-

gation by anyone could have produced any testimony that would differ from the true situation, namely, that the wife had taken the automobile without permission.)

Mr. Castro testified that neither Mr. Mehlin nor his wife were served with summons and complaint and stated that nothing would be gained by serving them as long as Claggett had permission to use the vehicle. (Tr., p. 92.) This presupposed the existence of an omnibus coverage in the policy. If such coverage did not exist the only liability against Mr. and Mrs. Mehlin would have been the ownership liability with the statutory limits of $5,000. California Vehicle Code, Section 402.

After the answer was filed Mr. Castro testified that a memorandum to set the case for trial was served February 25, 1948, and a stipulation for trial was entered into to the effect that the case could be tried on July 7, 1948.

No further conversations between counsel occurred until about a week or ten days before the trial date, at which time Mr. Dana asked for a continuance and said he thought it was a case which should be settled and stated that if a consent to a continuance was given he thought he could work out a settlement. The continuance was refused. Another request for a continuance was made a few days before trial with another statement about settlement if it could be continued. Again the continuance was refused. (Tr., p. 93.)

On July 1st or 2nd Mr. Castro testified that Mr. Bledsoe called advising that he was going to move for a continuance and Mr. Castro further testified that on the morning of trial on July 7th a formal motion for a continuance was made and granted upon condition that certain expenses and jury fees be paid by defendant. Mr. Castro then related that he was told by Mr. Bledsoe after the continuance was granted that a question of permissive use was involved and that the company had not secured any reservation of rights up to that time and he did not know what he could do about it because of Claggett's absence. (Tr., p. 94.) (This recitation of evidence omits the uncontradicted fact that Mr. Castro's office was advised on the morning of July 2nd that there was a policy coverage question involving permissive use.)

The testimony of Mr. Castro also reveals that an amended answer was filed by leave of Court on July 7th, changing the admission of permissive use to a denial thereof as far as the named insured was concerned, and merely admitting that Claggett was driving the vehicle with the permission of Mrs. Mehlin. (Tr., p. 95.)

Thereafter Mr. Castro related that the State Court action was tried with counsel for the insurance company representing Claggett. (Tr., p. 96.)

The foregoing is all of the evidence offered by appellee in support of the claim of waiver and estoppel. It is apparent that there is nothing in the foregoing statement of evidence that would indicate any knowl-

edge on the part of the insurance company concerning the facts and circumstances under which the vehicle was brought to California.

Section B.

Mr. William Hunt, an assistant claims manager for the insurance company testified. (Tr., pp. 164 to 189.) Mr. Hunt said that the insurance company received its first notice that the automobile had been taken out of the State of Nebraska without the permission of the named insured in the early part of July, 1948, and less than a week before the actual trial date. (Tr., p. 165.) He said that upon receipt of this information he sent a teletype message to the St. Paul office asking for a thorough investigation and requesting the obtaining of a nonwaiver agreement from the assured, and that a nonwaiver agreement was also obtained from Mr. Claggett, the driver of the car, under date of July 9, 1948. This was taken in the State of Nebraska. (Tr., p. 166.)

Mr. Hunt also testified that after learning from his counsel the information relating to the removal of the car from Nebraska, the insurance company obtained statements from the named insured and his wife under date of August 25, 1948. This was after the trial of the case in the State Court and they were taken in Nebraska. (Tr., pp. 168 and 169.) These statements were the first statements that were taken from Mr. and Mrs. Mehlin by the insurance company that dealt with the subject of the taking of the car from the State of Nebraska. (Tr., p. 169.) Mr. Hunt said that

after these statements were taken by counsel in Nebraska on August 25th and referred out to the California office that was the first information Mr. Hunt had of the details concerning the taking of the automobile out of the State of Nebraska. (Tr., p. 170.)

Mr. Hunt said that no statement had been taken from the assured before that because he was not in the car at the time of the accident. (Tr., p. 171.)

Mr. Hunt also established the limited authority of Mr. Gripenstraw and Mr. Dennis, namely, that they were adjusters who investigated accidents and negotiated settlements with limited authority up to $3,000. (Tr., pp. 172 and 173.)

Mr. Hunt, under cross-examination, testified that the insurance company knew that Claggett had the permission of Mrs. Mehlin, and that they did not question the coverage because Mrs. Mehlin said she was the wife out here for a visit and the company assumed that being the wife she had the husband's permission. (Tr., p. 175.) He also testified that during the settlement negotiations the company thought the policy covered and that they did not make any check in Nebraska about it because they assumed that the information the company had obtained from Mrs. Mehlin was correct, namely, that Claggett was driving with her permission. (Tr., p. 175.)

Further cross-examination reveals the following:

> "Q. (By Mr. Boyd): Isn't it a fact, Mr. Hunt, that at the time you authorized your adjustor to offer $7500, the only information that

you had had or requested from Mrs. Mehlin was whether or not she had authorized Mr. Claggett to drive that car?

A. That's correct, yes." (Tr., p. 176.)

Mr. Hunt was unable to say how the summons and complaint came into the office, but the record indicated it had been served on Claggett the 27th of December, 1947, approximately two months after the accident. (Tr., p. 178.)

Mr. Hunt also testified, under cross-examination, as follows:

"Q. Now, Mr. Hunt, at the time that you first contacted Mr. Claggett, there was no doubt in your mind at that time but that he was operating the car with Mrs. Mehlin's permission, is that true?

A. That is right, with her permission; that is right.

Q. And there was no doubt in your mind at that time that the policy covered Mr. Claggett, was there?

A. As far as we knew at that time, that is correct.

Q. And during the time that you were negotiating with Mr. Castro through your adjustor, there was no doubt in your mind but that the policy covered Mr. Claggett, was there?

A. No, I don't think we would have had negotiations if there was any doubt in our minds.

Q. If Mr. Gripenstraw stated to Mr. Castro that the automobile was being operated with the permission of the owner at the time that he was

negotiating, that would have been with your full approval, would it not, sir?

A. I am sure Mr. Gripenstraw didn't make that statement.

Q. If he had made that statement you certainly would have had no objection to it?

A. I could have objected; I wouldn't be bound by his statements." (Tr., pp. 182 and 183.)

And at page 186 he testified:

"Q. And during the months of November, December of 1947, January, February, March, April, May and June of 1948, you never questioned the company's coverage for Mr. Claggett, did you?

A. We didn't question the coverage until we found out the truth of the situation from Nebraska."

And at page 188:

"Q. Is there anything in the file that indicates that the Nebraska office at any time up until this deposition was taken had contacted either Mr. or Mrs. Mehlin?

A. There is nothing in our file that would indicate it."

The insurance company called as a witness John Dennis, claim adjuster who investigated the accident on behalf of the insurance company, who said his duties were to investigate accidents and compromise claims. He first learned of the case the first week in November. By that time a proof of loss had been filed by Mrs. Mehlin, and he then interviewed the driver Claggett and took a statement from him. (Tr., pp.

189 to 191.) He also interviewed Mrs. Mehlin in Richmond, California. Mrs. Mehlin did not tell Mr. Dennis that she had taken the car from Nebraska without her husband's permission. (Tr., p. 192.) What she did tell him was that she was visiting in California, and that her husband was at home. She stated also that she did not know how long she would be in California since she was visiting with friends. (Tr., pp. 192 and 193.) He asked for her home address, which she gave as the Lincoln, Nebraska, address. This Lincoln, Nebraska, address was also set forth in the proof of loss that Mrs. Mehlin had submitted. (Tr., p. 193.) Mrs. Mehlin also confirmed that Claggett had been driving the car with her permission. (Tr., p. 193.)

On cross-examination Mr. Dennis testified that he asked about the visit of Mrs. Mehlin, and that he did not question her about Mr. Mehlin, except that he was at home, and that he did not ask Mrs. Mehlin if she had permission of her husband to take the automobile, and when asked why he did not ask her that question, Mr. Dennis replied that he did not think the question occurred to him. (Tr., p. 195.) He also assumed that the wife had permission to use the automobile and to give anyone else permission. Mr. Dennis also had learned that Claggett came from Minnesota, and that he was living in Richmond on a temporary basis. (Tr., pp. 195 and 196.) (This would indicate that both the assured's wife and Claggett were acquainted in the middle west, although Mr. Dennis learned that Mr. Claggett did not know Mr. Mehlin.) (Tr., p. 196.) In this connection, Mr. Dennis said that he is not em-

ployed to make assumptions, but to contact the witnesses and the driver of the car; that on the face of it there was nothing to arouse suspicion and his function was to learn about the accident. (Tr., p. 196.)

Mr. Dennis also went on to relate how his function did not include passing on coverage questions, but merely involved collecting the facts. (Tr., pp. 196 to 198.)

It was developed that Mr. Claggett was being represented by his own attorney in connection with the criminal charges. (Tr., p. 199.) Mr. Dennis did not see Mr. Claggett except to get his statement from him about the accident until the time of trial. (Tr., p. 200.)

Mr. Dennis testified affirmatively that Mrs. Mehlin never at any time told him that she had separated from her husband or that she had taken the car out of the State of Nebraska without her husband's consent.

On February 1, 1948, after settlement negotiations had terminated the insurance company's Nebraska office wrote to the company to find out whether Claggett was a possible agent of the assured at the time of the accident, since the file did not reflect clearly on this subject. On February 24, 1948, the California office replied by stating that the use of the car was a personal one and no agency was involved.

Appellant called Louis Gripenstraw, who testified (Tr., pp. 208 to 218). He said he was a claim adjuster and that he talked to attorney Castro at the end of

December, a few days after Claggett had been served. He secured an extension of time to plead and asked for a demand of settlement. He did not recall any conversation about permissive use and he made no statement to Mr. Castro in that connection. Policy coverage was not discussed. (Tr., p. 209.)

He had a second conversation with Mr. Castro to secure more time to plead, but made no offer of any amount to settle and said he had no authority to make an offer, and denied that he made any statement that there was no question about permissive use of the automobile.

On cross-examination he said he did not even have a file on this case because he worked out of the San Francisco office as an investigator. He believed he was obtaining time to plead for all parties, or in any event, to keep the time open pending investigation and settlement negotiations. (Tr., pp. 212 and 213.) He did not know who had been served. He did not have very much familiarity with the file. (Tr., p. 214.) He said he had authority to settle cases up to $3,000.

Mr. Bledsoe, one of the attorneys for the insurance company who handled the State Court action, testified. (Tr., pp. 218 to 245.) His testimony was to the effect that the insurance company file was referred to his office February 7, 1948; that he first saw the file July 2, 1948, after a continuance had been refused and it became necessary for him to prepare it for trial; that he saw a letter in the file dated April 19, 1948, from attorneys in Nebraska which indicated that Mrs.

Mehlin had not had permission to bring the car to California. The next day, July 3rd, Mr. Bledsoe testified that he advised Mr. Crowley in Mr. Castro's office of a possible coverage question and that he asked for a continuance of the trial. The continuance was refused. He also testified that he tried to locate Claggett at the California address in Richmond without success. (Tr., p. 222.) He likewise advised Mr. Crowley that he wanted to amend the answer to change the admission with reference to permissive use, and that he quoted the letter from the Nebraska attorneys to Mr. Crowley concerning Mr. Mehlin's contentions about his wife's leaving Nebraska. (Tr., p. 223.) He prepared a motion for a continuance and a motion for leave to amend and also an amended answer. He telephoned the State Farm after the July 4th holiday, which was the first date they were open after he had seen the file, and told them to locate Claggett and get a reservation of rights agreement from him; to interview the Mehlins, and get statements from them about the permissive use question and to try to get Claggett to come to California for the trial. He made a motion for a continuance and for leave to amend, both of which were granted. At the time these motions were presented both the State Court judge and opposing counsel were told of the policy coverage question. (Tr., pp. 227 and 228.)

Mr. Bledsoe first talked to Mr. Claggett July 13th, just before trial and secured a nonwaiver agreement from him and secured his permission to waive a jury. The nonwaiver agreement appears at Tr., p. 231. An

earlier agreement had been obtained from Claggett in Nebraska on July 9, 1948. After the trial Mr. Bledsoe was asked by Mr. Castro if the coverage question was good and Mr. Bledsoe stated he did not know because he had not yet obtained statements from the Mehlins. (Tr., p. 235.) Mr. Bledsoe also testified that they continued to represent Claggett because they did not feel that it would be proper to desert him on the eve of trial. He also testified that as soon as he got the continuance of the trial he telephoned the attorneys in Nebraska, who had written in April, and asked them to confirm the information supplied in their letter. (Tr., p. 236.)

This testimony was also to the effect that there was no information in his file indicating that there was no coverage, or that the automobile had been taken from Nebraska without the permission of the named assured, except the letter from the Nebraska attorney, which was not received until April, 1948. (Tr., p. 237.) (There were no settlement negotiations after April, except a plea for a continuance with a suggestion that settlement negotiations might be resumed, which plea was rejected by counsel for the plaintiff.)

It was likewise testified to that Mr. Claggett was never seen by onyone in the attorney's office until July 13, 1948, when he came out to California for the trial. (Tr., p. 238.) Similarly, counsel had never talked to Mr. and Mrs. Mehlin and had no statements from them until after the case was tried in the State Court. (Tr., p. 238.)

On cross-examination, Mr. Bledsoe also testified to the effect that the answer had been prepared on the basis of information contained in the insurance company's file, which had the statement of Claggett and the formal proof of loss by Mrs. Mehlin, neither of which contained any hint or information that the vehicle was in California without the consent of the assured.

There had been no communication with Mr. Claggett on the part of counsel, except letters written to him to advise him of the trial date, which Claggett had never answered. There was correspondence with him after the trial to advise him that no appeal would be taken. (Tr., p. 244.)

Section C.

Section 404 of the 1947 California Vehicle Code:

> "*Service of Process on Nonresident.*
>
> (a) (Service on Director of Motor Vehicles.) The acceptance by a nonresident of the rights and privileges conferred upon him by this code or any use of the highways of this State as evidenced by the operation by himself or agent of a motor vehicle upon the highways of this State or in the event such nonresident is the owner of a motor vehicle then by the operation of such vehicle upon the highways of this State by any person with his express or implied permission, is equivalent to an appointment by such nonresident of the director or his successor in office to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against

said nonresident operator or nonresident owner growing out of any accident or collision resulting from the operation of any motor vehicle upon the highways of this State by himself or agent.

(b) (Same: Force and validity.) The acceptance of such rights and privileges or use of said highways shall be a signification of the agreement of said nonresident that any such process against him which is served in the manner herein provided shall be of the same legal force and validity as if served on said nonresident personally in this State.

(c) (Same: Manner of service.) Service of such process shall be made by leaving a copy of the summons and complaint with a fee of two dollars ($2) for each nonresident to be so served in the hands of the director or in his office at Sacramento and such service shall be a sufficient service on said nonresident subject to compliance with subdivision (d) hereof.

(d) (Mailing of notice of service and copy of summons and complaint: Personal service equivalent to mailing.) A notice of such service and a copy of the summons and complaint shall be forthwith sent by registered mail by the plaintiff or his attorney to said defendant. Personal service of such notice and a copy of the summons and complaint upon said defendant wherever found outside this State shall be the equivalent of said mailing.

(e) (Same: Proof of compliance with subsec. (d).) Proof of compliance with subsection (d) hereof shall be made in the event of service by mail by affidavit of the plaintiff or his attorney

showing said mailing, together with the return receipt of the United States post office bearing the signature of said defendant. Such affidavit and receipt shall be appended to the original summons which shall be filed with the court from out of which such summons issued within such time as the court may allow for the return of such summons. In the event of personal service outside this State such compliance may be proved by the return of any duly constituted public officer, qualified to serve like process of and in the State or jurisdiction where the defendant is found, showing such service to have been made. Such return shall be appended to the original summons which shall be filed as aforesaid.

(f) (Continuances.) The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action.

(g) (Record of process and service.) The director shall keep a record of all process so served upon him which record shall show the day and hour of service.

(g) ('Nonresident' defined.) As used in this section 'nonresident' means a person who is not a resident of this State at the time the accident or collision occurs."